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FAMILY LAW IN ONTARIO

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Publisher's Special Release Note 2021

The pages in this work were reissued in December 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the December 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

What's New in this Update:

This release features updates to Chapter 3 (Family Law and the Legal Process in Ontario) and Appendix WPJ (Words and Phrases).

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Highlights

New case law includes:

- **§ 3:113 Securing the Support Order** — When a court has the opportunity to order the individual with the support obligation to post security, it looks to the presence of circumstances that would suggest that, but for the posting of the security, the support would not be paid. It will therefore consider whether the party has a history of financial mismanagement, the possibility that the payor may leave the jurisdiction, past failure to honour support obligations, a poor employment history, non-residence status in Ontario but property in the jurisdiction of the court and, as is sometimes known to happen, the support payor has declared in advance that he or she has no intention to pay the support order. See, for example, *McMaster-Pereira v. Pereira*, 2021 CarswellOnt 10850, 336 A.C.W.S. (3d) 322, 2021 ONCA 547 (Ont. C.A.), at paras. 34-38; and *Katz v. Katz* (2014), 50 R.F.L. (7th) 1, 377 D.L.R. (4th) 264 (Ont. C.A.).
- **§ 3:122 Meaning of “Property”** — Prior to the *Family Law Act*, pensions were not considered to be family assets subject to division upon marriage breakdown. Now, however, division of interests in pensions is an area of great interest for lawyers, clients and actuaries. A pension is an asset that must be valued, included in the net family property calculations and, in some cases, divided. Just as pension benefits are an asset capable of division, so too are any survivorship benefits of the non-member spouse in the pension, and these too must be considered in the net family property calculation. See *McMullen v. McMullen* (2021), 55 R.F.L. (8th) 202, 61 C.C.P.B. (2nd) 301 (Ont. S.C.J.).

New words added to Appendix WPJ, Words and Phrases include:

- **CUSTOMARY CARE** — Ontario — The care and supervision of a First Nations, Inuk or Métis child by a person who is not the child’s parent, according to the custom of the child’s band or First Nations, Inuit or Métis community: *M.L. v. B.T.* (2022), 2022 ONCA 240, 2022 CarswellOnt 3480 (Ont. C.A.) at para. 34 Grant Huscroft J.A.)
- **SETTLEMENT PRIVILEGE** — Supreme Court of Canada — Settlement privilege is a rule of evidence that protects the confidentiality of communications and information exchanged for the purpose of settling a dispute [...]. It is recognized as fundamental to the making of an agreement between parties [...] because it promotes honest and frank discussions, which can make it easier to reach a settlement in all types of mediation [...]. The privilege applies in the general law of mediation without having to be invoked by the parties, because it [TRANSLATION] “presupposes that all discussions in the course of mediation between the parties are protected at all times” ([Piché, Catherine. *La preuve civile*, 6e éd. Montréal: Yvon Blais, 2020] at Nos. 1284-86; see also [*Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800] at para. 34). Unlike a confidentiality clause in a contract, “settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded” (*Union Carbide*, at para. 51). This common law rule, often called the “duty of confidentiality” in Quebec law, has been codified in art. 4 N.C.C.P. since the reform of the *Code of Civil Procedure* [...]. Settlement privilege is not absolute, however. For one thing, the parties can change its scope by contract [...], as long as they do not deprive a court of its supervisory jurisdiction over matters of public order. There are also some exceptions developed by the courts or established by law that allow confidentiality to be lifted on an exceptional basis [...]. (*Association de médiation familiale du Québec v. Bouvier* (2021), 64 R.F.L. (8th) 1, 2021 CSC 54, 2021 SCC 54, 464 D.L.R. (4th) 383, 2021 CarswellQue 18849, 2021 CarswellQue 18848 (S.C.C.) at para. 95, 96 Per Kasirer J. (Wagner C.J.C., Moldaver, Côté, Brown, Rowe JJ. concurring))

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